SERVED: March 16, 1994

NTSB Order No. EA-4122

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of March, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. STEPHEN T. SWIFT, Respondent.	)	Docket SE-13438

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Chief Administrative Law Judge William E. Fowler, Jr., at the conclusion of an evidentiary hearing held in this case on February 10, 1994.[1] In that decision, the law judge found that respondent had performed aerobatic maneuvers below 1,500 feet above the surface, but that the Administrator had failed to prove

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

that respondent operated an aircraft so close to another aircraft as to create a collision hazard. Accordingly, the law judge dismissed the alleged violation of 14 C.F.R. 91.111(a), affirmed violations of 14 C.F.R. 91.13(a) and 91.303(e),[2] and modified the Administrator's emergency order, which sought to revoke respondent's private pilot certificate, to provide instead for a 180-day suspension of that certificate.[3] Respondent seeks a reversal of the initial decision, or, in the alternative, a

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[2] 14 C.F.R. 91.111(a) provides as follows:

§ 91.111 Operating near other aircraft.

(a) No person may operate an aircraft so close to another aircraft as to create a collision hazard.
* * *

Section 91.13(a) provides:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Section 91.303(e) provides as follows:

§ 91.303 Aerobatic flight.

No person may operate an aircraft in aerobatic flight --
* * *
(e) Below an altitude of 1,500 feet above the surface . . .
* * *
For the purposes of this section, aerobatic flight means an intentional maneuver involving an abrupt change in an aircraft's attitude, an abnormal attitude, or abnormal acceleration, not necessary for normal flight.

[3] The Administrator withdrew his earlier-filed appeal from the law judge's initial decision.

reduction in the sanction.

For the reasons discussed below, we affirm the law judge's findings of violations, but reduce the 180-day suspension ordered by the law judge to a 90-day suspension of respondent's pilot certificate.

The Administrator's emergency order alleged, in part, as follows:

> 2. On or about October 3, 1993, you operated civil aircraft N3719, a Starduster biplane, on a flight in the vicinity of Dalton Municipal Airport (DNN), Dalton, Georgia ("the flight").
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> 3. During the flight, you performed or executed at least one aileron roll, within approximately one mile of the runway at DNN.
>
> 4. During the flight, you performed or executed maneuvers involving an abrupt change in the aircraft's attitude, abnormal altitudes, or abnormal acceleration, not necessary for normal flight ("aerobatic flight"), all within approximately one mile of the runway at DNN.
>
> 5. During the flight, you operated N3719 so close to another aircraft, N36511, a Piper Archer, so as to create a collision hazard.
>
> 6. During the flight, you operated N3719 in aerobatic flight below an altitude of 1,500 above the surface and within approximately one mile of the runway at DNN.
>
> 7. By reason of the above, you have demonstrated that you lack the qualifications necessary to be the holder of any airman certificate.

The law judge dismissed the most serious charge in this case, that of operating so close to another aircraft as to create a collision hazard, finding that the Administrator had not proved by a preponderance of the evidence that respondent was at fault in the near-miss between the Starduster piloted by respondent and

a Piper Archer piloted by one of the Administrator's witnesses in this case. (Tr. 189.) Because the Administrator has not challenged that dismissal, only respondent's alleged unlawful aerobatic flying is at issue in this appeal.

Aileron roll.

It is undisputed that respondent, with a passenger on board, performed an aileron roll in the Starduster, an aircraft which is specifically designed for aerobatic flight. However, respondent contended at the hearing that he was some three miles from the airport and approximately 3,000 feet above the surface when he performed this maneuver. Respondent offered testimony from an eyewitness, who was on the ground at the airport at the time of the maneuver, corroborating respondent's testimony regarding these distances. The Administrator, on the other hand, presented testimony from three other eyewitnesses, including the two pilots who were in the Piper Archer during the near-miss with respondent's aircraft, who stated that the aileron roll occurred at 500-800 feet above the surface, and only one mile from the airport.[4] The law judge resolved this conflicting testimony in

[4] Respondent asserts that one of the Administrator's witnesses (Jerry Fradenburg) actually testified that the maneuver was performed at 1,500 feet above the surface (thus supporting respondent's position that it was legal under section 91.303(e)). (App. Br. at 5.) The transcript shows that Mr. Fradenburg testified as follows:

> Q Could you estimate approximately what altitude he was when you saw [the aerobatics]?
> A Approximately 1500 feet maybe or less.
> Q Does that mean sea level, above ground --
> A Yeah.

(Tr. 85.) Respondent contends that the transcript is incomplete

favor of the Administrator's witnesses, concluding that respondent engaged in aerobatic flight below 1,500 feet above the surface, and within one mile of the runway. (Tr. 191-2.)

Low-level high speed pass.[5]

The Administrator also presented testimony from the same three eyewitnesses that, in addition to the aileron roll, respondent cut sharply in front of a Cessna 172 which was on short final (i.e., approaching the runway for a landing), and made a high-speed pass approximately 10-20 feet above the runway. According to witness Fradenburg, the Starduster "started down in a swooping turn, . . . a steep turn, and . . . [came] straight

(..continued)
in that it omits Mr. Fradenburg's alleged clarifying statement, "above ground level or AGL," in reference to respondent's altitude. The difference between sea level and ground level is significant because the airport in question is 710 feet above sea level. Accordingly, 1,500 feet above sea level is equivalent to 790 feet above ground level.

Upon our request, the reporting company has reviewed the tape recording of that portion of the proceedings and has assured us, in writing, that this portion of the transcript is accurate. Counsel for the Administrator asserts, and we tend to agree, that Mr. Fradenburg's interruption of counsel's question indicates that his affirmative "yeah" refers to the first part of that question, "Does that mean sea level?"

[5] We recognize, as respondent's counsel alluded at the hearing, that, unlike the aileron roll, this purported aerobatic maneuver is not specifically described in the complaint. (See Tr. 24, 113.) The complaint does, however, contain general allegations that respondent performed aerobatic maneuvers below 1,500 feet and within a mile of the airport. The law judge overruled respondent's objection to receiving testimony about the alleged low-level pass, and accepted evidence and argument from both sides pertaining to the incident. We note that, despite his initial objection to the Administrator's testimony, respondent made no claim that he was unprepared to litigate the issue.

On appeal, respondent does not challenge the law judge's inclusion of this incident in his ultimate findings of violation. Accordingly, we will continue to treat the high-speed low-level pass as a matter properly before the Board.

down the runway, . . . under ten feet, . . . and about mid point on the runway . . . pull[ed] into a steep climb." (Tr. 86.)

Respondent conceded he made the low-level pass, but claimed it was part of a "go around" necessitated by an attempted "dead stick landing" which he was forced to abandon at the last minute. He denied knowing he had cut in front of another aircraft. Respondent did not attempt to rebut or address Mr. Fradenburg's testimony that he also performed a steep dive and a steep climb.

The law judge accepted the Administrator's characterization of the maneuver, finding that respondent had made a "low level pass," and cited that as an example of respondent's "careless" flying on the date in question. (Tr. 189-90.) Though the law judge did not specifically refer to the steep dive and steep climb described by Mr. Fradenburg, we think his initial decision indicates that he considered these maneuvers to be at least careless, if not also impermissible low-level aerobatics.[6]

The law judge's factual findings in this case are largely based on his credibility assessments of conflicting eyewitness testimony. The Board will not overturn those findings unless the law judge acted arbitrarily, capriciously, or the result was incredible or inconsistent with the overwhelming weight of the

[6] For example, the law judge specifically referenced "the aileron roll," "*the acrobatics*," and "the low level pass," to support his finding that respondent "engaged in a careless manner of flying." (Tr. 189-90, emphasis ours.) By process of elimination, "the acrobatics" could only refer to the steep dive and steep climb described by Mr. Fradenburg.

evidence,[7] factors not present here. Respondent's suggestion that Mr. Halman (the pilot of the Archer) was motivated to lie about respondent's altitude during the aerobatic maneuvers because of Mr. Halman's (in respondent's view) role in causing the near mid-air with respondent's aircraft, does not invalidate the law judge's credibility findings, since the circumstances of that incident were on the record and known to the law judge.[8]

The law judge's legal conclusions are also correct. Although respondent contends that the law judge "inferred that an aileron barrel roll in itself was a violation" (App. Br. at 4),[9] we think the record as a whole reveals that the law judge was

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[7] Administrator v. Wilson, NTSB Order No. EA-4013 at 4-5 (1993).

[8] As we said in Administrator v. Calavaero, Inc., 5 NTSB 1099, 1100 (1986):

> Our law judges have broad discretion to accept as a matter of credibility the testimony, self-serving or otherwise, of any witness over the testimony of any other witness or witnesses as to their factual observations. Consistent with that authority, so long as the interests and motivations which could influence or color a witness' testimony are reasonably apparent on the record, the law judge's credibility assessments, made within his exclusive province as trier of the facts, are presumed to reflect a proper balance of all relevant considerations, including witness demeanor, and will not be disturbed on appeal absent extraordinary circumstances not present in this case.

[9] Presumably, respondent is referring to the following language in the law judge's initial decision: "[Respondent] . . . certainly in my opinion engaged in a careless manner of flying, low operation, an aileron barrel roll, which was totally unnecessary, people on the ground at the airport, including a woman and a child, and respondent's response as to why he performed this barrel roll in response to my question directed to him, was in essence just for the fun of it, just for the thrill of it." (Tr. 190.)

well-informed as to the nature of the violation he was being asked to find. It was pointed out several times during the hearing that the aircraft flown by respondent was designed for this type of maneuver, and that aerobatics are not per se impermissible. Counsel for the Administrator stated in closing argument that altitude and distance from the airport were the only disputed issues regarding the aileron roll. (Tr. 170.) And the law judge himself found that respondent had violated the regulation "by operating an aircraft in [aerobatic] flight below an altitude of 1500 feet above the surface." (Tr. 193.) To the extent that he may have judged the violation to be more serious because of an incorrect belief that aileron rolls are per se careless, this is remedied by our independent evaluation and reduction of the sanction.

We also agree with the law judge's conclusion that respondent's low-level pass, preceded by a steep dive and followed by a steep climb, while carrying a passenger, constituted careless operation, in violation of section 91.13(a). We hold that those maneuvers also constituted aerobatic flight below 1,500 feet, in violation of section 91.303(e).

We disagree with the law judge, however, that a 180-day suspension is warranted for the violations in this case. We have affirmed a range of sanctions in cases involving unlawful aerobatic flight, depending on the egregiousness of the offense.[10] In our view, the circumstances of this case[11] are less

[10] Administrator v. Couch, NTSB Order No. EA-3655 (1992) (30

serious than in those cases where we have affirmed a 180-day suspension. We think that a 90-day suspension is more appropriate and consistent with our precedent.

(..continued)
days apportioned to 90 degree banked turn 50-100 feet above ground immediately after takeoff); Administrator v. Rina, 6 NTSB 470 (1988) (30 days affirmed for two instances of aerobatics within a control zone); Administrator v. Philippon, 3 NTSB 839 (1977) (60 days affirmed for steep climbs and dives less than 1,000 feet over a congested area, citing precedent for 30, 45, 60, and 120 days); Administrator v. Van Dusen, 2 NTSB 2479 (1976) (90 days affirmed for two flights involving loops at less than 1,500 feet when occupants, including passenger for hire, were not wearing approved parachutes); Administrator v. Dennis, 2 NTSB 1693 (1975) (120 days affirmed for low-level "dogfighting" in proximity of an airport leading to a fatal aircraft crash); Administrator v. Nazimek, 6 NTSB 74 (1988) (180 days affirmed for multiple low passes over persons and property at several locations, and independent low-flight violation involving evasive maneuvers to avoid contact with ground-based structures); Administrator v. Downs, 3 NTSB 230 (1977) (180 days affirmed for two low-level rolling maneuvers which did not comply with aircraft operating limitations, and when occupants were not wearing approved parachutes); and Administrator v. McCllellan, 5 NTSB 2217 (1987) (180 days affirmed for aileron roll and loop maneuvers over an airport, resulting in a crash, when occupants, including three passengers, were not wearing approved parachutes).

[11] There were no allegations in this case that the maneuvers exceeded the aircraft's operating limitations, or that occupants should have been, but were not, wearing approved parachutes. We note also that this case involves a limited number of maneuvers and, though they were performed in the vicinity of an uncontrolled airport, they were not conducted over congested areas.

ACCORDINGLY, IT IS ORDERED THAT:

1. The initial decision is affirmed, except as modified here with regard to sanction; and

2. Respondent's pilot certificate is suspended for 90 days.[12]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[12] According to the Administrator's brief, respondent surrendered his certificate to the FAA on January 10, 1994.